

**United States Department of Labor
Employees' Compensation Appeals Board**

E.F., Appellant)	
)	
and)	Docket No. 18-1723
)	Issued: May 1, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
ALBANY VETERANS HOSPITAL, Albany, NY,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 13, 2018 appellant, through counsel, filed a timely appeal from a July 26, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 12, 2013 appellant, then a 48-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that, on June 11, 2013, she developed cervical neck pain with radiating arm numbness while turning a patient over in bed. When the patient pushed against her, she felt a pop in her neck. Appellant noted that she had previously undergone a cervical laminectomy. She stopped work on the date of injury. On March 13, 2015 OWCP accepted the claim for herniated nucleus pulposus (HNP) at C6-7.

On June 16, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a January 14, 2016 treatment note, Dr. John Whalen, a Board-certified orthopedic surgeon, noted that appellant had neck pain and right arm symptoms. He opined that she continued with a permanent 75 percent disability causally related to the June 11, 2013 employment injury. Dr. Whalen opined that appellant had reached maximum medical improvement.

By development letter dated February 1, 2016, OWCP advised appellant that additional evidence was necessary to establish her schedule award claim. It requested that she submit an impairment evaluation from her attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ OWCP afforded appellant 30 days to submit the necessary evidence.

In a February 11, 2016 treatment note, Dr. Whalen reiterated his opinion that appellant continued with a permanent 75 percent disability causally related to her June 11, 2013 employment injury.

By decision dated March 18, 2016, OWCP denied the claim for a schedule award. It found that the evidence of record was insufficient to establish that appellant sustained permanent impairment of a scheduled member or function of the body due to her accepted work injury. OWCP explained that the medical documentation on file did not include a final rating of permanent impairment and a discussion of the rationale for calculation of the impairment, with reference to the applicable criteria and tables of the A.M.A., *Guides*.

⁴ Docket No. 14-1776 (issued November 14, 2014). The Board remanded the case for further development as to whether appellant had established that her diagnosed cervical condition was causally related to the accepted June 11, 2013 employment incident.

⁵ A.M.A., *Guides* (6th ed. 2009).

On March 29, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on November 8, 2016.

Appellant submitted a November 4, 2016 report wherein Dr. Whalen noted that appellant returned for follow-up of the fusion to C6-7/C5-7 performed on November 25, 2013. Dr. Whalen explained that her symptoms were ongoing with pain in the anterior upper arm. He reiterated his opinion that appellant had 75 percent disability.

By decision dated December 28, 2016, OWCP's hearing representative affirmed the March 18, 2016 decision. He found that Dr. Whalen failed to provide findings, citations, and calculations regarding the degree of permanent impairment, utilizing the A.M.A., *Guides* to support the opinion rendered. The hearing representative concluded that as the case file was devoid of such medical evidence permanent impairment could not be determined.

On January 26, 2017 appellant, through counsel, requested reconsideration and submitted new medical evidence from Dr. Stewart Kaufman, a Board-certified orthopedic surgeon.

In a December 19, 2016 report, Dr. Kaufman noted appellant's history of injury and treatment. He explained that, in January 2013, she had undergone a C5-6 cervical discectomy and decompression, and on November 25, 2013 she had undergone a C6-7/C5-7 extension of the fusion surgery. On January 28, 2016 a magnetic resonance imaging (MRI) scan revealed C4-5 disc changes. Dr. Kaufman diagnosed cervical sprain with C5-6 herniated disc, C6-7 status post revision surgery, with fusion C5-7, and now C4-5 disc changes, and moderate right carpal tunnel syndrome. He utilized the A.M.A., *Guides*, Table 17-2, through Table 17-9⁶ explaining that appellant's C5-6 and C5-7 fusion and discectomies resulted in 15 percent whole person impairment. Dr. Kaufman referred to Table 15-11,⁷ and opined that appellant had 25 percent right upper extremity impairment.

In a March 30, 2017 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), noted that the A.M.A., *Guides* do not allow a schedule award for the spine, nor does it recognize a whole person impairment, except for the lung. He explained that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), must be utilized to assess impairment with regard to spinal nerve impairments. Dr. Katz recommended that Dr. Kaufman be afforded the opportunity to submit a supplemental report. He advised that, if Dr. Kaufman was unable to comply, he recommended a second opinion impairment evaluation with a Board-certified specialist in physical medicine and rehabilitation or orthopedic surgery who was familiar with the A.M.A., *Guides*.

By development letter dated April 13, 2017, OWCP provided Dr. Kaufman with a copy of the DMA's March 31, 2017 report and requested that he provide an addendum report to address the DMA's concerns.

By letter dated May 23, 2017, counsel provided a May 10, 2017 addendum from Dr. Kaufman. Dr. Kaufman recommended a repeat electromyography (EMG) study of the cervical

⁶ *Id.* at 575-81.

⁷ *Id.* at 420.

spine and the upper extremities to provide objective findings, as this could seriously impact the impairment rating. He also noted that an evaluation by a neurologist was appropriate.

In a June 20, 2017 report, the DMA agreed that a second opinion evaluation should be scheduled and that a neurological consultation and electrodiagnostic testing was warranted.

By letter dated August 25, 2017, OWCP referred appellant for a second opinion examination with Dr. Patrick Hughes, a Board-certified neurologist.

In a September 13, 2017 report, Dr. Hughes noted appellant's history and related that he utilized the July/August 2009 *The Guides Newsletter*. He noted that appellant's EMG and nerve conduction velocity (NCV) studies were normal, but found that she had six percent upper extremity permanent impairment.

In a November 9, 2017 memorandum of telephone call, OWCP contacted appellant and confirmed that she had not yet undergone an EMG study.

On November 21, 2017 OWCP referred appellant for an EMG study on December 4, 2017, with Dr. Steven Weinstein, Board-certified in pain medicine and physical medicine and rehabilitation. Dr. Weinstein opined that she had moderate right median neuropathy at the wrist, mild left median neuropathy at the wrist, no evidence of right or left ulnar neuropathy, and no evidence of right or left C5-T1 radiculopathy.

In a January 31, 2018 addendum, Dr. Hughes opined that appellant had 20 percent scheduled loss of use for her carpal tunnel on the right hand due to numbness over the first three fingers.

In a May 9, 2018 report, Dr. Hughes explained that he saw appellant for follow-up and noted that he initially attributed her numbness in the second, third, and fourth fingers to C6 and C7 radiculopathies. However, after reviewing the EMG studies, he found that her numbness was due to carpal tunnel syndrome, as documented by the December 4, 2017 EMG and NCV studies, and was not due to cervical radiculopathy. Dr. Hughes opined that since there was no evidence of radiculopathy, appellant had no permanent impairment caused by her cervical condition.

In a July 23, 2018 report,⁸ Dr. Katz, the DMA, explained that the December 4, 2017 EMG/NCV study, demonstrated that appellant had no evidence of right or left C5-T1 radiculopathy. He noted that Dr. Hughes found an intact motor examination and sensory changes compatible with median nerve entrapment, rather than dermatomal loss. Dr. Katz opined that appellant had no permanent impairment pursuant to *The Guides Newsletter*.

By decision dated July 26, 2018, OWCP denied modification of its prior decision. It found no permanent impairment associated with the accepted work-related condition.

⁸ The report is dated July 23, 2017; however, this is a typographical error.

LEGAL PRECEDENT

The schedule award provisions of FECA⁹ and its implementing federal regulations,¹⁰ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of specified members of the body. However, FECA does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as the standard for evaluation of schedule losses and the Board has concurred in such adoption.¹¹ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.¹²

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.¹³ Because neither FECA, nor the regulations provide for the payment of a schedule award for the permanent loss of use of the spine,¹⁴ no claimant is entitled to such an award.¹⁵ However, in 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provision of FECA includes the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity, even though the cause of the impairment originated in the spine.¹⁶

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* has offered an alternative approach to rating spinal nerve impairments.¹⁷ OWCP has adopted this approach for rating permanent impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in a

⁹ 5 U.S.C. § 8107.

¹⁰ 20 C.F.R. § 10.404.

¹¹ *Id.* at § 10.404(a).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹³ *B.W.* Docket No. 18-1415 (issued March 8, 2019). *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *Pamela J. Darling*, 49 ECAB 286 (1998).

¹⁴ FECA specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹⁵ *Thomas Martinez*, 54 ECAB 623 (2003).

¹⁶ *J.M.*, *supra* note 13; *see Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁷ *R.B.*, Docket No. 17-1995 (issued August 13, 2018); *Rozella L. Skinner*, 37 ECAB 398 (1986).

July/August 2009 *The Guides Newsletter*.¹⁸ Specifically, OWCP will address upper extremity impairment originating in the spine through Table 15-14.¹⁹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In support of her claim for a schedule award, appellant submitted January 14, February 11, and November 4, 2016 treatment notes from Dr. Whalen generally opining that she had 75 percent disability causally related to her work injury. She also submitted a December 19, 2016 report from Dr. Kaufman, who opined that she had 15 percent whole person impairment, or 25 percent right upper extremity impairment. However, a schedule award is only payable for permanent impairment originating in the spine if permanent impairment of an extremity is established pursuant to *The Guides Newsletter*.²⁰ A schedule award is not payable for whole person impairment.²¹ Drs. Whalen and Kaufman did not indicate that appellant had sustained any permanent impairment of the upper extremities due to the accepted cervical herniated disc at C6-7, pursuant to *The Guides Newsletter*.²² As such, their reports are of limited probative value.

In a September 13, 2017 report, Dr. Hughes, the second opinion physician, related that he had used the July/August 2009 *The Guides Newsletter* and determined that appellant had six percent upper extremity impairment, however, he did not initially review an EMG report to determine sensory or motor loss. As *The Guides Newsletter* rates permanent impairment based upon sensory or motor loss, this initial report did not meet the standards of *The Guides Newsletter*.²³ Dr. Hughes provided a January 31, 2018 addendum and opined that appellant had a 20 percent permanent impairment due to carpal tunnel of the right hand due to numbness over the first three fingers. In a May 9, 2018 report, he explained that while he initially attributed her numbness in the second, third, and fourth fingers of the right hand to C6 and C7 radiculopathies, after reviewing the December 4, 2017 EMG and NCV studies, he determined that appellant's numbness was due to carpal tunnel syndrome, and not cervical radiculopathy. With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of the scheduled member as a result of his or her employment injury. As carpal tunnel syndrome was not an accepted condition and Dr. Hughes did not establish that this condition was causally related

¹⁸ *Supra* note 13 at Chapter 3.700, Exhibit 1, (January 2010); *The Guides Newsletter* is included as Exhibit 4.

¹⁹ *Supra* note 6 at 425.

²⁰ *R.H.*, Docket No. 17-1017 (issued December 4, 2018).

²¹ *See S.D.*, Docket No. 18-0855 (issued November 28, 2018).

²² *Id.*

²³ *See B.W.*, Docket No. 18-1415 (issued March 8, 2019).

to the accepted employment injury, appellant is not entitled to a schedule award for her carpal tunnel syndrome condition.²⁴

Regarding appellant's accepted cervical condition, Dr. Hughes opined that based upon her EMG and NCV studies, there was no evidence of radiculopathy, and she therefore had no permanent impairment under *The Guides Newsletter* due to the accepted cervical condition. On July 23, 2018 Dr. Katz, serving as the DMA, properly reviewed Dr. Hughes' reports and agreed that appellant did not have a ratable impairment as appellant had no evidence of right or left cervical radiculopathy. A schedule award based upon a cervical condition is proper under *The Guides Newsletter* only if there is objective evidence of cervical radiculopathy, which has caused sensory loss or motor weakness.²⁵ Dr. Hughes and Dr. Katz therefore properly found that, lacking these findings, appellant was not entitled to a schedule award. Therefore their opinions carry the weight of the medical evidence.

It is appellant's burden of proof to establish a permanent impairment of a scheduled member or function of the body as a result of an employment injury.²⁶ She did not submit such evidence and both the second opinion physician and the DMA found that she had no permanent impairment. Thus, appellant has not met her burden of proof to establish her schedule award claim.²⁷

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

²⁴ *T.W.*, Docket No. 16-0176 (issued January 10, 2018); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

²⁵ *See D.A.*, Docket No. 18-0779 (issued December 12, 2018).

²⁶ *Tammy L. Meehan*, 53 ECAB 229 (2001).

²⁷ *See R.H.*, Docket No. 17-1069 (issued June 6, 2018); *D.M.*, Docket No. 17-1128 (issued November 22, 2017).

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board